United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1708

United States Court of Appeals

For the Second Circuit.

DAVID DeMATTEIS,
Plaintiff-Appellant,

vs.

EASTMAN KODAK COMPANY,
Defendant-Appellee.

BRIEF OF DEFENDANT-APPELLEE.

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THE REPORTER COMPANY, INC., Walton, N. Y. 13856—607 865-4191—1974
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Preliminary Statement.

This is an appeal from an unreported opinion and order of the United States District Court for the Western District of New York, entered by Honorable Harold P. Burke, District Judge, on April 22, 1974, which dismissed plaintiff-appellant's complaint. The action is brought by a retired employee of defendant-appellee, solely on his own behalf, who claims that he suffered discrimination in employment because he sold his home to a black fellow-employee in 1965. Plaintiff-appellant alleges that because of this sale, he was so harassed, in a variety of ways, that by November, 1971, he had to retire. Appellant seeks declaratory relief; damages for mental and physical suffering; together with back pay, punitive, and undetermined damages.

Issues Presented.

1. Did the court below have jurisdiction over appellant's Title VII claims?

2. Did the complaint allege "State Action", requisite for a claim upon 42 U.S.C. §1983?

3. Did the complaint state a claim for which relief could be granted upon 42 U.S.C. §1981?

4. Was appellant's action upon 42 U.S.C. §1981 timely filed?

5. Did the complaint otherwise state a cause of action upon 42 U.S.C. §2000(e) *et seq.* or upon the Thirteenth Amendment to the United States Constitution?

Facts.

Plaintiff-appellant charged defendant-appellee with discrimination in employment before the United States Equal Employment Opportunities Commission[1] on February 26, 1972. On March 29, 1972, appellant filed a similar charge before the New York State Division of Human Rights. Appellant withdrew his State Division of Human Rights charge on April 28, 1973.

The EEOC investigated appellant's charge of discrimination, and found that appellant had not suffered discrimination in his employment.

By letter of May 8, 1973, the EEOC informed appellant of its dismissal of his discrimination charge and of

[1]Hereinafter referred to as EEOC.

his rights to pursue his claim further, if he so chose (D-A, B, pp. 23-30).[2]

On or about July 26, 1973, appellant received a further, undated, communication from the EEOC, entitled "Notice of Right to Sue" (P-D, p. 17). His complaint was filed on October 3, 1973, and served on November 20, 1973. By stipulation of the parties, appellee's time to answer was extended until December 21, 1973 at which time its motion to dismiss was filed (pp. 18-20).

Upon the complaint, the motion to dismiss, the papers in support thereof (pp. 21-30), appellant's answering papers (pp. 31-35), and upon appearances for the parties before the court, Judge Burke dismissed the complaint in its entirety, by order dated April 19, and entered April 22, 1974 (pp. 36-40).

POINT I.

The District Court lacked jurisdiction over the Title VII claims.

A. The jurisdiction of inferior Federal Courts is limited to that conferred by statute.

Unquestionably, inferior Federal Courts have only such jurisdiction as is conferred upon them by Congress through *statute*. They may not, by decision, extend that jurisdiction. *See e. g., American Fire & Casualty Company v. Finn,* 341 U. S. 6 (1951); *Reid v. United States,*

[2]Reference to plaintiff's exhibits are P-A, P-B, etc. Reference to defendant's exhibits are D-A, D-B, etc. Where the exhibit is printed in the Appendix, the page reference will also be given. All references to page numbers are to pages in the Appendix, unless otherwise specified.

211 U. S. 529 (1909); *Williams v. Rogers*, 449 F. 2d 513 (8th Cir. 1971), *cert. den.*, 405 U. S. 926 (1972).

Moreover, it has long been settled that a Federal District Court cannot, by claiming that it is exercising equity, extend the jurisdiction granted it by Congress. *Briggs v. United Shoe Machinery Company*, 239 U. S. 48 (1915); *DiGiovanni v. Camden Fire Insurance Association*, 296 U. S. 64 (1935).

B. Timely filing of a Title VII action is a jurisdictional prerequisite.

Appellant's action is based, in part, upon Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000(e) *et seq.* (hereinafter referred to as "Title VII"). Title VII requires, in relevant part, as follows:

> * * * If a charge filed with the Commission pursuant to section (b) of this section is dismissed by the Commission * * * the Commission * * * shall so notify the person aggrieved and within 90 days after the giving of such notice a civil action may be brought against the respondent named in the charge * * * by the person claiming to be aggrieved * * *. 42 U.S.C. §2000(e)-5(f)(1).

Federal District Court jurisdiction over Title VII actions extends only to suits filed within the 90-day time period specified in the statute. *E. g., Archuleta v. Duffy's Inc.*, 471 F. 2d 33 (10th Cir. 1973); *Choate v. Caterpillar Tractor Co.*, 402 F. 2d 357 (7th Cir. 1968); *Genovese v. Shell Oil Co.*, 488 F. 2d 84 (5th Cir. 1973).

The court in *Goodman v. City Products Corp.*, 425 F. 2d 702, 703 (6th Cir. 1970), emphasized that Title VII requires timely filing of a civil action before a District Court has jurisdiction to hear a Title VII complaint:

> While uncertainties and ambiguities may exist in regard to other time limitations provided in the Civil Rights Act of 1964, there appears no such uncertainty or ambiguity with regard to the 30 day limitation here involved. The Statute clearly provides that "* * * a civil action may, within thirty days thereafter, be brought * * *." The permissive verb "may" refers to the option of the aggrieved party to bring a lawsuit, not to a discretion in the Court to receive the case following the expiration of 30 days.

(The court was interpreting the pre-1972 version of 42 U.S.C. §2000(e)-5 which permitted 30, not 90 days, to file suit after notice of EEOC dismissal.)

As was emphasized in *Harris v. National Tea Company*, 454 F. 2d 307, 309 (7th Cir. 1971), courts cannot waive jurisdictional statutory time limitation:

> The effect to be given a limitation period contained in a statutory enactment is aptly stated in *Kavanagh v. Noble*, 332 U. S. 535, 539, 68 S. Ct. 235, 237, 92 L. Ed. 150:
>
> "Such periods are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary. *Rosenman v. United States*, 323 U. S. 658, 661 (65 S. Ct. 536, 538, 89 L. Ed. 535). *Remedies for resulting inequities are to be provided by Congress, not the courts.*" (Italics added.)

C. Notice of Dismissal of an EEOC charge begins the running of the time to file a civil action.

The most recent legislative history of Title VII is the legislative history to the 1972 Amendments. Reference to the legislative history establishes that the 90-day filing period begins to run upon notice of dismissal:

On October 28, 1971, the Senate Committee on Labor and Public Welfare submitted its report on Senate Bill 2515 from which the 1972 amendments were produced. In this report the following statement appears under the section by section analysis of the bill:

> Section 706(q).—This subsection preserves the private right of action by an aggrieved person. Under this subsection, the aggrieved person may bring such an action *within 60 days after being notified by the Commission that it has dismissed the charge,* or when 180 days have elapsed from the filing of the charge without the Commission having issued a complaint under section 706(f) or the Attorney General having filed a civil action under section 706(f) or without the Commission having entered into an agreement under section 706(f) or (i) to which the person aggrieved is a party. Report No. 92-415—*See,* 117 *Cong. Rec.* 17099 (daily ed. Oct. 28, 1971). (Italics added.)

Similarly, on January 19, 1972, Senator Williams, one of the sponsors of the bill, read into the record a comparison of the 1964 Act with the changes proposed by the Senate and House Bills. With respect to the right to private action and the time limitation thereon, he offered the following summary of the Senate Bill:

> The occurrence of either one or two circumstances enables the person aggrieved to bring a civil action to obtain relief from an alleged unlawful employment practice. First, such an action may be brought within 60 days of receipt of notification from the EEOC that it has dismissed the charge. Second, such an action may be brought if the EEOC fails to act on a charge within 180 days of its filing (or such time as required to defer to State or local law). 118 *Cong. Rec.* 93 (daily ed. Jan. 19, 1972).

Thus, Congress did intend that a private person must file his action within 90 days of the receipt of notice of dismissal of the charges by the EEOC.

Finally, the section by section analysis of H. R. 1746 (a report of the Committee of the Senate-House Conference considering Title VII, dated March 6, 1972) leads to the same conclusion. This section reads in relevant part:

> With respect to cases arising under this subsection, if the Commission: (a) has dismissed the charge * * * the person aggrieved may bring an action in an appropriate district court within 90 days after receiving notification. 118 *Cong. Rec.* 3462 (daily ed. Mar. 6, 1972).

The conclusion is inescapable that Congress intended the 90-day limitation to start running upon plaintiff's receipt of notice that the EEOC was no longer pursuing his charges.

D. Plaintiff was not entitled to two notices from the EEOC.

Despite the clear requirements of Title VII, as supported by its recent legislative history, appellant insists that the EEOC's notice of its dismissal of his charge, dated March 8, 1973, did not begin the statutory 90-day time limit during which his action could have been filed (appellant's brief, pp. 13-15). Rather, appellant argues that a "notice of right to sue," obtained at his request, extended his time to file the instant action beyond the 90 days set forth in the statute.

Unquestionably, decisions have referred to a "right to sue" notice as a prerequisite to filing a Title VII action, *e. g., Beverly v. Lone Star Lead Construction Corp.*, 437 F. 2d 1136 (5th Cir. 1971). However, the court in

Beverly made clear, (1) the "rig to sue" notice simply serves as a signal that administrative action has ceased and (2) the particular language set forth in the notice is not crucial:

> To this end, the tenor of the cases has established only two jurisdictional prerequisites to suit in federal court under Title VII: (1) the filing of a complaint with the EEOC and (2) the receipt of the statutory notice of right to sue. Early formulation of the latter requirement used the following language: "he must receive statutory notice from the EEOC that it has been unable to obtain voluntary compliance." Subsequent decisions have made it clear that this language, taken from Section 2000e-5, is not to be interpreted in its narrowest sense; it is not necessary either for the Commission to state in its notice that it has been unable to obtain voluntary compliance or for the Commission to have engaged in any attempt at conciliation whatsoever. The sole purpose of this requirement is to provide a formal notification to the claimant that his administrative remedies with the Commission have been exhausted. 437 F. 2d 1136, 1139-1140.

At least two other courts have correctly noted that the form that the EEOC uses to inform a charging party of the right to pursue further action is not crucial. *Cf. Gates v. Georgia-Pacific Corporation*, 492 F. 2d 292 (9th Cir. 1974); *see, Shaffield v. Northrup Aircraft Service*, 373 F. Supp. 937 (N.D. Ala. 1974).

In the case at bar, the EEOC's notice dated May 8, 1974 (pp. 23-30), fulfilled the statutory purpose and policy of informing appellant that his administrative remedies had been exhausted. This notice informed appellant that:

(1) His EEOC charge had been dismissed, and the reasons therefor.

(2) He had the right to pursue the matter further in court.

Therefore, no subsequent notice was necessary.

Moreover, in essence, appellant's argument is one of form over substance: i. e., that the EEOC did not send him the proper piece of paper on May 8, 1973, but did send him the proper piece of paper on July 26, 1973.

In his brief, appellant concedes that the 90-day filing period specified in the statute is a condition upon the District Court's jurisdiction (appellant's brief, p. 9). Nonetheless, appellant contends that the running of the jurisdictional 90-day time period depends on form with which the EEOC notified appellant that his charge had been dismissed. Appellant never has contended that he was not aware that his charge had been dismissed nor has he ever claimed that he was aware of his right to pursue a civil action.

Finally, it is plain that acceptance of appellant's construction of Title VII would not only exalt form over substance but would also result in rendering the statutory jurisdictional prerequisite meaningless. Appellant's argument deletes the 90 day filing requirements from the statute, since simply by delaying one's request for a document entitled "Right to Sue" after receiving the notice of dismissal, a plaintiff could extend the time to file a civil action *ad infinitum*—plus 90 days! In the case of a charge dismissed by the EEOC, such a result directly contravenes the statute.

E. The District Court's jurisdiction cannot be founded upon improper EEOC regulations.

Appellant attempts to establish the District Court's jurisdiction over his complaint by relying on selected EEOC regulations (Appellant's Brief, pp. 11-12). Relying upon 29 C.F.R. §1601.25b(d) and §1601.25c(d), appellant argues that a "notice of right to sue," in addition to the notice he received on May 8, 1973, had to be issued before his time to file his lawsuit began to run (appellant ignores 29 C.F.R. §1601.19). If the regulations do purport to require a "notice of right to sue," in addition to a notice of dismissal, the regulations must be disregarded. Title VII makes no mention of a "notice of right to sue." The EEOC regulations cannot alter the jurisdictional requirements set forth in the statute, and this court should not give deference to the administrative regulations of the EEOC to the extent that they deviate from the terms of the statute. *See, Espinoza v. Farah Manufacturing Company,* 414 U. S. 86 (1973); *Red Lion Broadcasting Company v. Federal Communications Commission,* 395 U. S. 367, 381 (1969); *U. S. v. Garbutt Oil Co.,* 302 U. S. 528 (1939); *See Also, Zuber v. Allan,* 396 U. S. 168, 193 (1969); *Volkswagenwerk Aktiengsellschaft v. Federal Maritime Commission,* 390 U. S. 261 (1968).

F. This court should not, in this case, ignore the requirements of Title VII.

In *Genovese v. Shell Oil Co., supra,* the Fifth Circuit considered the question of whether the clear requirements of Title VII should be ignored when a plaintiff had failed to meet the statutory filing deadline. Plaintiff therein argued that Title VII should be liberally construed in favor of plaintiffs. The court correctly rejected this argument saying:

> There is no room here for liberal or strict statutory constructions since it is clear from the language of 42 U.S.C. §2000(e)-5 that the 30-day requirement for the filing of suit is mandatory and jurisdictional. 488 F. 2d 84, 86.

However, in *Gates v. Georgia-Pacific Corporation, supra,* a Ninth Circuit panel held, in part, that the requirements of Title VII can be ignored upon "equitable principles." It is submitted that the panel decision in *Gates* should not be followed in this case.

In *Gates,* Mrs. Gates was notified on December 16, 1968, that her EEOC charge was closed by the EEOC for lack of jurisdiction. The EEOC did not inform her of her right to pursue her charge further. On December 20, 1968, Mrs. Gates asked the EEOC to reconsider her charge. On January 14, 1969, the EEOC denied reconsideration but informed her that she could file suit within 30 days "in accordance with notice previously sent to her," 492 F. 2d 292, 293. On January 20, 1969, Mrs. Gates informed the EEOC that it had forgotten to send her a notice. On January 23, 1969, the EEOC sent her a letter "stating that through error it had not sent her a 30 day notice * * *." 492 F. 2d 292, 293. Mrs. Gates started her action in District Court on February 20, 1969.

The court held that the District Court had jurisdiction over the action since Title VII did not speak of "no jurisdiction letters"; that Mrs. Gates was confused by the EEOC's admitted error; and that "equitable principles" may operate to toll the 30-day (now 90-day) filing requirement.

Gates is not controlling authority in this case on the facts, since:

1. Appellant received notice of the EEOC's action together with lengthy reasons therefor on or about May 8, 1973 (pp. 23-30).

2. Appellant knew of his right to pursue the matter further on or about May 8, 1973. Regardless of the form, the EEOC notified appellant of his rights (pp. 23-30).

3. Appellant had private counsel (P-D, p. 17) before the ninety-day time limitation from May 8, 1973, ran, so that even if appellant had been "confused" by the EEOC, counsel should have dispelled any confusion. Moreover, appellant's "confusion" is based on a clever reading of the EEOC's regulations (appellant's brief, p. 12), so that his "confusion" may have occurred entirely after the fact.

Not only are the facts of *Gates* distinguishable from the instant case, but *Gates* must not be followed since the decision is poorly reasoned and lacks appropriate authority for its holding. The court in *Gates* ignored the fact that it lacked jurisdiction to, *sua sponte*, "toll" the jurisdictional time period set forth in the statute. See, *Briggs v. United Shoe Machinery Company, supra; DiGiovanni v. Camden Fire Insurance Association, supra.*

The court in *Gates* cited two authorities for its decision to "toll" the 30 day limitation period: *Stebbins v. Nationwide Mutual Insurance Co.*, 469 F. 2d 268 (5th Cir. 1972), and *McQueen v. E.M.C. Plastic Co.*, 302 F. Supp. 881 (E.D. Tex. 1969). However, these decisions do not support that point. In *Stebbins*, the time limit was not tolled, although the court noted, without reference to any authority,

that in some case tolling might be appropriate. The court in *McQueen,* likewise failed to cite authority for its assumption of the power to toll the statute. Moreover, *McQueen* is clearly distinguishable from appellant's case. In *McQueen,* plaintiff's failure to comply with the time limit was largely due to an error of the District Court itself. Further, the plaintiff's attorney in *McQueen* was excused for his failure to properly and timely represent plaintiff because his wife was ill with terminal cancer at the time plaintiff was referred to him.

Therefore, neither *Gates,* nor the authorities upon which it is founded, support the conclusion that the District Court below had jurisdiction over appellant's complaint.

Concededly, it has long been held that "procedural technicalities" should not foreclose a Title VII plaintiff's right to proceed in Federal Court. *Burns v. Thiokol Chemical Corporation,* 483 F. 2d 300 (5th Cir. 1973); *Sanchez v. Standard Brands, Inc.,* 431 F. 2d 455 (5th Cir. 1970). These, and similar, cases hold that a plaintiff should not be penalized for defects in pleading or discovery matters. By contrast, the jurisdictional defect in appellant's case can hardly be termed a "procedural technicality."

POINT II.

The complaint fails to allege "State Action" requisite for a claim upon 42 U.S.C. §1983.

Paragraph 12 of appellant's complaint alleged only that appellee performs "public work" in the "metropolitan area"; that much of this work is financed by one or more

levels of government, and that some of appellee's employees receive earnings from government contracts (p. 10).

Solely upon these allegations, appellant claimed that appellee's actions are "State Action."

The U. S. Supreme Court recently considered the following situation: A black man sought an injunction against a private club whose liquor facilities were licensed and regulated by the state. He also sought to force the State Liquor Board to revoke the club's liquor license. Plaintiff argued that his complaint alleged "State Action" because of the following relationships between the state and the club: The club's actions were regulated by the State of Pennsylvania; the club enjoyed a partial monopoly of the service of liquor by virtue of the state license; and the club enjoyed a grant of the state's power. *Moose Lodge No. 107 v. Irvis,* 407 U. S. 163 (1972) (hereinafter referred to as *"Moose Lodge"*).

In *Moose Lodge,* at pages 172-175 the Supreme Court reviewed its own definition of "State Action" back to the *Civil Rights Cases,* 109 U. S. 3 (1883), and in so doing, set forth six measures of "State Action."

1. Does the state enforce the complained of privately originated discrimination?

2. Is the private entity so interdependent with the state that the state has to be recognized as a joint participant in the challenged activity?

3. If the impetus for the discrimination is private, has the state "significantly involved itself with invidious discrimination"?

4. Does that state have laws which command the private entity to commit to discriminatory conduct?

5. Are the private entity's profits not only contributions to, but an indispensable element in the financial success of the state, or an arm of the state?

6. Does the complained action of the state grant the private entity a complete monopoly in the area of the complained actions?

Scrutiny of the complaint in light of these six tests compels the conclusion that appellant failed to allege "State Action" in his complaint.

First, appellant did not and could not allege that New York State, in any way, enforced or aided appellee in the private discrimination alleged in the complaint. Cf. *Shelly v. Kraemer*, 334 U. S. 1 (1948).

Second, appellant alleged no joint participation by New York State in the alleged discriminatory actions. The complaint did not allege that New York State had any opportunity to directly control appellee's actions toward appellant. Cf. *Burton v. Wilmington Parking Authority*, 365 U. S. 715 (1961).

Third, New York State, simply by buying products, does not condone, aid or establish an employer's right to commit discriminatory acts. Cf. *Reitman v. Mulkey*, 387 U. S. 369 (1967).

Fourth, New York State has no laws which command an employer to commit discriminatory acts. To the contrary, the State has laws that forbid discrimination (Executive Law Section 296 *et seq.*) and an administrative agency which actively enforces such laws, The New York State

Division of Human Rights. Cf. *Peterson v. City of Greenville,* 373 U. S. 244 (1963).

Fifth, it can hardly be said that any one company's profits, however large they might be, are indispensable to the financial success of New York State. Cf. *Burton v. Wilmington Parking Authority, supra.*

Sixth, the State has not granted appellee any monopoly, much less one on employment. This action alleged discrimination in employment. It is not and cannot be shown that appellee has any monopoly on employment. Cf. *Lavoie v. Bigwood,* 457 F. 2d 7 (1st Cir. 1972); *Ihrke v. Northern State Power Company,* 459 F. 2d 566 (8th Cir. 1972); *Palmer v. Columbia Gas of Ohio, Inc.,* 479 F. 2d 153 (6th Cir. 1973.) [In fact, even a complete monopoly may not be "State Action." See, *Lucas v. Wisconsin Electric Power Company,* 466 F. 2d 638 (7th Cir. 1972), cert. denied, 409 U. S. 1114 (1973); *Jackson v. Metropolitan Edison Company,* 483 F. 2d 754 (3rd Cir. 1973)].

Moreover (even though appellant is raising this issue for the first time upon this appeal) even if appellee is regulated by various levels of government, regulation does not establish "State Action." As the Supreme Court noted in *Moose Lodge:*

> However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any rule or success a partner or even a joint venturer in the club's enterprises. 407 U. S. 163, 176-177.

Certainly, the complaint did not allege existence of state or federal regulations which foster or encourage the discrimination alleged in appellant's complaint.

Moreover, appellant now contends, on appeal, that defendant's actions are "State Action" by virtue of the "public function or company town test of *Marsh v. Alabama*" (plaintiff's brief, p. 37). This allegation was not in the complaint, nor did appellant seek to amend his complaint to add this allegation. Further, appellee clearly exercises no governmental powers as were exercised by the defendants referred to in *Marsh v. Alabama*, 326 U. S. 501 (1946); *Terry v. Adams*, 345 U. S. 461 (1953); *Evans v. Newton*, 382 U. S. 296 (1966); *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U. S. 308 (1968); or *Lloyd v. Tanner*, 407 U. S. 551 (1972). Further, despite appellant's attempts to allege, not in his complaint, but in his brief, that appellee "pervades and in a large sense, controls all aspects of its employees' existence" (appellant's brief, p. 38), none of the facilities which appellee provides for its employees (e. g., social, cultural, athletic, medical, etc. or benefits, e. g., banking, savings and loan, and insurance, etc.) are exercises of governmental power. Moreover, appellee's facilities, offices, and factories are not open to the public, nor do any employees spend virtually all their lives upon defendant's premises (as was the case in *Marsh v. Alabama, supra*).

If appellant's allegations, even as improperly amplified in his brief, were taken to be enough to allege "State Action" for purposes of 42 U.S.C. 1933, or the United States Constitution, then any act of any large employer would be, *ipso facto*, "State Action." Certainly, "such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in The Civil Rights Cases." *Moose Lodge*, page 173.

POINT III.

The complaint failed to state a claim for which relief could be granted upon 42 U.S.C. §1981.

Although it is unclear which claims are based upon 42 U.S.C. §1981, the complaint sets forth no allegation of discrimination towards any black person; nor that appellant was unable to sell his home to a black person; nor that appellant received any lower price for his home because he sold to a black person. It is also conceded that appellant is white.

Many courts have ruled, without discussion, that a white person can never sue upon Section 1981. *Abshire v. Chicago and Eastern Illinois R. R.*, 352 F. Supp. 601 (N.D. Ill. 1972); *Agnew v. City of Compton*, 239 F. 2d 226 (9th Cir. 1956), cert. den. 353 U. S. 959 (1957); *Fitzgerald v. United Methodist Community Center*, 335 F. Supp. 965 (D. Neb. 1972); *Harris v. National Tea Co.*, 4 FEP Cases 3 (N.D. Ill. 1971), aff'd 454 F. 2d 307 (7th Cir. 1971); *Perkins v. Banister*, 190 F. Supp. 98 (D. Md. 1960), aff'd 285 F. 2d 426 (4th Cir. 1960).

Other courts have held that a white person may not sue upon Section 1981 since any injury the white person suffered was not because of that person's own race. *League of Academic Women v. Regents of University of California*, 343 F. Supp. 636 (N. D. Cal. 1972); *Marshall v. Plumbers and Steamfitters Local 60*, 343 F. Supp. 70 (E.D. La. 1972); *Tramble v. Converters Ink Co.*, 343 F. Supp. 1359 (N.D. Ill. 1973); *Williams v. San Francisco Unified School District*, 340 F. Supp. 438 (N.D. Cal. 1972).

No Circuit Court has specifically addressed itself to the questions of a white persons' right to bring an employment discrimination action pursuant to 42 U.S.C. §1981.

One District Court has recently authorized such a suit, *WRMA Broadcasting Co., Inc., v. Hawthorne,* 365 F. Supp. 577 (M. D. Ala. N. D. 1973). It is submitted that this decision's treatment of §1981 is improper and contrary to the weight of authority.

In two decisions, decided in the same district at the same time, white plaintiffs brought suit upon all sections of the Reconstruction Civil Rights Acts, *seriatim,* after black groups disrupted plaintiff's church services. *Central Presbyterian Church v. Black Liberation Front,* 303 F. Supp. 894 (E.D. Mo. 1969); *Gannon v. Action,* 303 F. Supp. 1240 (E.D. Mo. 1969). It is submitted that these decisions should be disregarded as authority for the proposition that whites may sue under 42 U.S.C. §1981 for relief from alleged *employment* discrimination. They were brought upon all the Reconstruction Civil Rights Acts, not just Section 1981, and, upon appeal, the Eighth Circuit Court of Appeals expressly declined to consider whether §1981 applied to the action. *Action v. Gannon,* 450 F. 2d 1227, 1229 (8th Cir. 1971).

Further, these cases have been disregarded by Courts deciding employment discrimination actions. *Ripp v. Dobbs Houses, Inc.,* 366 F. Supp. 204 (N.D. Ala. 1973); *Van Hoomissen v. Xerox Corp.,* 368 F. Supp. 829 (N.D. Cal. 1973), and cases cited therein.

In three recent decisions white plaintiffs alleged that they were fired, denied promotion or the like because they assisted minority group persons in attaining more job opportunities or simply because they associated with minority group persons. In all three, the white plaintiffs were not permitted to sue under §1981. *N.O.W. v. Bank of California,* 6 FEP Cases 26 (N.D. Cal. 1973); *Kipp v. Dobbs House, Inc., supra; Van Hoomissen v. Xerox Corp., supra.*

Over dissent, the Supreme Court has held that the complaint of a white plaintiff may be joined with the complaint of a black plaintiff in an action upon 42 U.S.C. §1982 to vindicate a property right denied the black, which also harmed the white's ability to sell property. *Sullivan v. Little Hunting Park, Inc.*, 396 U. S. 229 (1969). In that case, however, the white plaintiff himself suffered injury to his property right because of racial discrimination against a black person. Appellant herein made no allegation that he suffered any such injury to his property rights.

Nonetheless, appellant suggests that *Sullivan v. Hunting Park Inc., supra,* and *Tilman v. Wheaton-Haven Recreation Association, Inc.*, 410 U. S. 431 (1973), are authority for the proposition that a white person may sue for discrimination in employment upon Section 1981 (Appellant's Brief, p. 25, p. 27). Despite appellant's belated attempt to inject the question of possible discrimination again Dr. Lee (the purchaser of plaintiff's home), there is no allegation of any such discrimination in the complaint, nor was any before the District Court.

Appellant asserts that *Tilman v. Wheaton-Haven Recreation Association, supra,* detracts from the Supreme Court's prior express reservation of a ruling on the propriety of a white plaintiff suing upon Section 1981, enunciated in *Trafficante v. Metropolitan Insurance Co.*, 409 U. S. 205 (1972) (Appellant's Brief, pp. 27, 28). However, even a cursory reading of *Tilman* indicates that the Supreme Court considered only the issue as to whether the Recreation Association was a private club. While the Supreme Court found that since the Recreation Association was not a private club an action could be maintained against it, it did not consider the question of whether a white person may maintain an action upon Section 1981.

In short, it is fundamentally accepted by a compelling majority of authorities, including the Supreme Court of the United States, that 42 U.S.C. §1981 was not written for and does not provide a right of action for a white person suing entirely in his own behalf alleging discrimination in employment. Moreover, appellant's complaint, in failing to allege any injury to any black person, failed to state a claim for which relief to be granted upon 42 U.S.C. §1981.

POINT IV.

Appellant's action upon 42 U.S.C. §1981 was not timely filed.

A motion to dismiss for failure to bring an action in the applicable statute of limitations is properly raised by Federal Rules of Civil Procedure 12(b)(6). *Jones v. Rogers Memorial Hospital,* 442 F. 2d 773 (D.C. Cir. 1971); 2A Moore *Federal Practice,* ¶12.10 at 2314, 2316 (2d Ed. 1972). Appellant concedes that 42 U.S.C. §1981 sets forth no statute of limitations. Appellant further concedes that if a federal statute does not set forth a limitation, the applicable statute of limitations is that which the state would apply if the action had been commenced in state court (Appellant's Brief, p. 30), (see, e. g., *Beard v. Stephens,* 372 F. 2d 685 (5th Cir. 1967); *O'Sullivan v. Felix,* 233 U. S. 1318 (1914); *U.A.W. v. Hoosier Cardinal Corp.,* 383 U. S. 696 (1966) (cited by plaintiff).

This is an action for discrimination in employment. If this action were brought in a New York forum, it would necessarily be brought upon Executive Law §296(1)(a) and (e). These sections prohibit discrimination in employment.

Executive Law §297(5) requires that the complaint filed under the Executive Law be filed within one year after the occurrence of an alleged discriminatory practice.

Appellant's assertion (Appellant's Brief, p. 31), that the one year statute of limitation set forth the Executive Law §297(5) applies only to an administrative action ignores Executive Law §297(9). As 297(9) makes clear, an action alleging discrimination in employment may be brought in either a court or before an agency in this case, the New York State Division of Human Rights. The election is at the option of the complainant. If a complainant proceeds in state court upon Executive Law §296, the one year limitations period of Executive Law §297(5) unquestionably applies.

Two Circuit Courts, the Fifth and the District of Columbia, have ruled that filing a charge with the EEOC tolls the statute of limitations applicable to an action brought upon 42 U.S.C. §1981. *Johnson v. Goodyear Tire and Rubber Company*, 491 F. 2d 1364 (5th Cir. 1974); *Macklin v. Spector Freight Systems, Inc.*, 478 F. 2d 979 (D.C. Cir. 1973). However, neither of these cases present any rationale for this decision. For example, in *Johnson v. Goodyear*, the court cites as the *sole* authority for its decision on the tolling issue the decision in *Jenkins v. United Gas Corp.*, 400 F. 2d 28 (5th Cir. 1968). However, in *Jenkins*, the court made absolutely no reference to the question whether filing with the EEOC tolls the statute of limitations applicable to 42 U.S.C. §1981. In fact, the action, in *Jenkins*, was not brought upon Section 1981.

By contrast, the Sixth Circuit, in *Johnson v. Railway Express Agency, Inc.*, 489 F. 2d 525, 531 (6th Cir. 1973), cert. granted 42 U.S.L.W. 3661 (1974), carefully analyses *Macklin v. Spector Freight, supra,* and rejects *Macklin* as authority for the notion that filing with the EEOC tolls

the statute of limitations applicable to Section 1981. As the court in *Johnson* noted, the decision in *Macklin* is based on the theory that Title VII and Section 1981 offer entirely different and separate remedies for a plaintiff. For the *Macklin* court to rule, at the same time, that filing under Title VII tolls the Section 1981 limitation period defies the proposition that the statutes are separate and distinct. On its face the *Macklin* case is hopelessly illogical and inconsistent.

The Sixth Circuit view should be followed herein. It has long been held that 42 U.S.C. §1981 gave a black plaintiff a right of action for discrimination completely independent from Title VII, so that one need not comply with Title VII in order to sue pursuant to 42 U.S.C. §1981. *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F. 2d 1011 (5th Cir. 1971); *Sanders v. Dobbs Houses, Inc.*, 431 F. 2d 1097 (5th Cir. 1970), cert. den. 401 U. S. 948 (1971). Certainly one need not file a claim with the EEOC in order to proceed upon 42 U.S.C. §1981, since Section 1981 makes no mention of the EEOC. Conversely since Section 1981 makes no mention of the EEOC, there is no reason why filing a claim with the EEOC should toll the statute of limitations applicable to an action brought upon 42 U.S.C. §1981. *Johnson v. Railway Express Agency, supra.*

It is submitted that both the statutes themselves and the policies they were designed to implement compel the conclusion that the statutes are separate. However, if 42 U.S.C. §1981 provides a remedy separate and independent from 42 U.S.C. §2000(e), it should be separate and independent for both plaintiffs and defendants.

POINT V.

The complaint did not otherwise state a claim upon 42 U.S.C. §2000(e) *et seq.* or the Thirteenth Amendment to the United States Constitution.

Appellant is white and can make no claim for discrimination on the basis of race because of his employer's alleged discriminatory attitude toward blacks. In perhaps the only case where a white employee sued his employer because of its discriminatory attitudes toward blacks upon 42 U.S.C. §2000(e) *et. seq.* (Title VII) and where the employer questioned standing upon 42 U.S.C. §2000(e), the court held that the plaintiff had failed to make out a cause of action under Title VII. *Ripp v. Dobbs House Inc., supra.* The court in *Ripp* emphasized that §703(a) of Title VII made it clear that an employer may not penalize an employee in any way because of that employee's race. Appellant made no claim that appellee discriminated against him because he is white. As the court in *Ripp* stated:

> In short, the Court believes that if defendants maintain practices against blacks as plaintiff avers, the persons who are best situated to attack those practices are those persons who are in fact aggrieved. 366 F. Supp. 205, 210.

In this case, as was the case in *Ripp*, appellant challenges appellee's alleged discriminatory attitude towards blacks.

To allow whites to sue for discrimination against blacks upon Title VII upon facts as alleged by appellant would do no more than open the door for sham and collusive lawsuits that would make a mockery of Title VII.

Finally, appellant's complaint was vaguely drafted and was, therefore, difficult to answer. However, it is clear that 28 U. S. C. §§ 1343 (3), 1343 (4), and 2201 are not in themselves jurisdictional statutes, but afford a particular type of relief upon a proper showing if jurisdiction is founded upon other statutes or Constitutional provisions.

Moreover, the complaint did not and cannot show the necessary involuntary servitude and "badge of slavery" that are prerequisite for an action brought upon the Thirteenth Amendment. *Griffin v. Breckenridge,* 397 U. S. 1074 (1970); *Jobson v. Henne,* 355 F. 2d 129 (2nd Cir. 1966). The fact that plaintiff worked for defendant cannot under any circumstances be considered involuntary servitude in terms of the Thirteenth Amendment. Any Thirteenth Amendment claim must therefore be dismissed.

CONCLUSION.

The judgment of the District Court should in all respects be affirmed.

Upon the face of the complaint, the affidavits, and appearances of counsel before it, the District Court properly dismissed the complaint, and the judgment of the District Court should in all respects be affirmed.

/s/ JAMES H. MORGENSTERN,
NIXON, HARGRAVE, DEVANS & DOYLE,
Attorneys for Defendant-Appellee
Eastman Kodak Company,
Office and Post Office Address,
Lincoln First Tower,
Rochester, N. Y. 14603
(716) 546-8000.

Dated: November 6, 1974.

STATUTES AND REGULATIONS.

United States Statutes.

42 U. S. C. §2000e-5.

* * *

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employ-

ment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisioned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

* * *

(f) (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring civil action against such respondent in the appropriate United States district court. The persons or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental

agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a concilation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to, intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

42 U.S.C. §1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Federal Regulations.

29 CFR §1601.19 Dismissal of charge.

Where the allegations of a charge on its face, or as amplified by the statements of the charging party to the Commission, disclose that the charge is not timely filed or otherwise fails to state a valid claim for relief under title VII, the Commission, through the Director of the District Office where the charge is lodged, may dismiss the charge without further action. Where notice of the charge or the charge has been served, the aggrieved person, the person making the charge on behalf of such person, where applicable, and the respondent, shall be

notified in writing of the disposition of the charge, together with the reasons therefor. [37 FR 20165, Sept. 27, 1972]

29 CFR §1601.25 Notice to respondent, person filing a charge on behalf of the aggrieved person and aggrieved person.

(a) In any instance in which the Commission is unable to obtain voluntary compliance as provided by Title VII, as amended, it shall so notify the respondent, the person filing a charge on behalf of the aggrieved person, the aggrieved person or persons, and any State or local agency to which the charge has been previously deferred pursuant to §1601.12 or §1601.10. Notification to the aggrieved person shall include:

(1) A copy of the charge.

(2) A copy of the Commission's reasonable cause or no reasonable cause determination as appropriate.

(3) Advice concerning his or her rights to proceed in court under Section 709(f)(1) of Title VII.

[37 FR 9219, May 6, 1972]

29 CFR §1601.25b Processing of cases, when notice issues under §1601.25.

• • •

(b) The Commission shall not issue a notice pursuant to §1601.25 prior to a determination under §1601.19b or where reasonable cause has been found prior to efforts at conciliation with respondent, except as provided in paragraph (c) of this section.

(c) At any time after the expiration of one hundred and eighty (180) days from the date of the filing of a charge or upon dismissal of a charge at any stage of the proceedings, an aggrieved person may demand in writing that a notice issue pursuant to §1601.25, and the Commission shall promptly issue a notice, and provide copies thereof and copies of the charge to all parties.

[37 FR 9219, May 6, 1972, as amended at 37 FR 20165, Sept. 27, 1972]

New York Statutes.

Executive Law §296 Unlawful Discriminatory Practices.

1. It shall be an unlawful discriminatory practice:

(a) for an employer, because of the age, race, creed, color, national origin or sex of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

* * *

(e) for any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this article or because he has filed a complaint, testified or assisted in any proceeding under this article.

* * *

Executive Law §297 Procedure

* * *

5. Any complaint filed pursuant to this section must be so filed within one year after the alleged unlawful discriminatory practice.

* * *

9. Any person claiming to be aggrieved by an unlawful discriminatory practice should have a cause of action in any court of appropriate jurisdiction for damages and such other remedies as may be appropriate, unless such person had filed a complaint hereunder or with any local commission on human rights, provided that, where the division has dismissed such complaint on the grounds of administrative convenience, such person shall maintain all rights to bring suit as if no complaint had been filed. No person who has initiated any action in a court of competent jurisdiction or who has an action pending before any administrative agency under any other law of the state based upon an act which would be an unlawful discriminatory practice under this article may file a complaint with respect to the same grievance under this section.

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STATE OF NEW YORK, :
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That on the 6th day of November , 1974, at the request of Nixon, Hargrave, Devans & Doyle, Attorneys at Law,

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Joan deR. O'Byrne, Attorney at Law,

by depositing said two copies in postpaid wrapper at 4 p. m. on this day, in the United States Postoffice at Walton, New York, addressed to the above

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this 6th day of November , 1974.

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Notary Public

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November 14, 1974

The Honorable A. Daniel Fusaro, Clerk
United States Court of Appeals
for the Second Circuit
United States Court House
Foley Square
New York, New York 10007

RE: DeMatteis vs. Eastman Kodak Company
Docket No. 74-1708

Dear Sir:

Please note that there are two additional typographical errors in the brief of Defendant-Appellee Eastman Kodak Company which are as follows:

On Page 7 under Subsection "D" reference is made to notice of the dismissal of the charge dated March 8, 1973. The date should be May 8, 1973.

On Page 8 of the brief in the last paragraph on the page, the date of the notice is given as May 8, 1974 rather than May 8, 1973.

I would appreciate your cooperation in noting these additional typographical errors.

Very truly yours,

James H. Morgenstern/ld

James H. Morgenstern

JHM/ljd

cc: Joan de R. O'Byrne, Esq.

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November 7, 1974

The Honorable A. Daniel Fusaro, Clerk
United States Court of Appeals
for the Second Circuit
United States Court House
Foley Square
New York, New York 10007

RE: DeMatteis vs. Eastman Kodak Company
Docket No. 74-1708

Dear Sir:

Please note that on Page 9 of the brief of Defendant-Appellee Eastman Kodak Company, there is the following typographical error:

> The last sentence of the third full paragraph reads as follows:
>
> Appellant never has contended that he was not aware that his charge had been dismissed nor has he ever claimed that he was aware of his right to pursue a civil action.
>
> Please note that that sentence should read:
>
> Appellant never has contended that he was not aware that his charge had been dismissed nor has he ever claimed that he was unaware of his right to pursue a civil action.

I would appreciate your cooperation in noting this typographical error.

Very truly yours,

James H. Morgenstern

James H. Morgenstern

JHM/ljd
cc: Joan de R. O'Byrne, Esq.